SUPREME COURT, U.S.

73 - 1227

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

J.E. LAVALLEE, Superintendent of Clinton Correctional Facility,

Petitioner,

against

NATHANIEL WILLIAMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

J.E. LAVALLEE, Superintendent of Clinton Correctional Facility,

Petitioner,

against

NATHANIEL WILLIAMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Nathaniel Williams* v. *LaVallee,* which was decided on November 20, 1973.

Opinions Below and Other Relevant Materials

The decision of the Court of Appeals which petitioner seeks to review is not yet reported. It is reproduced in the appendix at page 1a. The decision of the United States District Court for the Southern District of New York, which was reversed by the Court of Appeals, is not published. It is reproduced in the appendix at page 31a. The decision of the Bronx County Supreme Court (MARKS,

J.), dated April 7, 1969, which denied a writ of error *coram nobis* following Williams' State evidentiary hearing is also unreported. It is reproduced at page 34a of the appendix.

Pertinent portions of Williams' State evidentiary hearing are reproduced at page 36a, ff. of the appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Circuit Court's remand in effect nullified the mandate of 28 U.S.C. § 2254(d) that a state court determination made after a full hearing "evidenced by a written finding, written opinion or other reliable and adequate indicia" shall be presumed to be correct?

2. Whether the circumstances surrounding respondent's failure to exercise his right to appeal indicate that he had in effect waived that right?

Statute Involved

28 U.S.C. § 2254(d)

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and ade-

quate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of

one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous".

Statement of the Case

A. Procedural Background

In this habeas corpus proceeding, the respondent Nathaniel Williams, seeks the restoration of his right to appeal from a 1965 conviction in New York State Supreme Court. Petitioner asserts that his failure to file a timely notice of appeal was due to his ignorance of the fact that he could appeal as an indigent.

This claim has already had a long, convoluted history in the state courts. It was apparently first raised in a 1966 coram nobis petition, after two motions for a trial transcript had been denied. Initially, the lower court denied defendant's motion for resentencing; however, at the urging of the District Attorney, the Appellate Division, in October, 1967, reversed to the extent of ordering a hearing as to defendant's indigence and his ignorance of his right to appeal (*People* v. *Williams,* 28 A D 2d 985).

This hearing, which is referred to in Part B, *infra,* pp. 5-7, was held on September 30 and November 7, 1968. Thereafter, on April 17, 1969, Mr. Justice Charles Marks denied petitioner's motion for resentencing. His decision was subsequently affirmed by the Appellate Division in March, 1970 (*People* v. *Williams,* 34 A D 2d 619); leave to

appeal was denied by the New York Court of Appeals on April 24, 1970 (BREITEL, J.).

During this time, petitioner was also contending that his sentence was invalid because it had not been preceded by a psychiatric examination, as required under § 2189-a of the former New York State Penal Law. Eventually, on May 25, 1970, following three separate examinations, he was resentenced *nunc pro tunc* in New York County Supreme Court to the prison term he was already serving. However, having been granted leave to appeal by the Appellate Division, First Department, Williams sought to appeal not only the resentencing but the merits of the conviction itself. This was denied in an opinion which noted, *inter alia,*

> "his [Williams'] review of the merits of the prior proceedings resulting in the adjudication of guilt was lost by failure timely to appeal from the judgment of conviction on the original sentence . . . Montgomery relief upon the resentence was precluded by virtue of unsuccessful direct proceedings heretofore had". (*People* v. *Williams,* 36 A D 2d 517 [1st Dept. 1971], at 518).

Subsequently, the resentencing was affirmed as not excessive (36 A D 2d 794 [1st Dept. 1971]).

Thereafter, following two more unsuccessful coram nobis proceedings, respondent on November 14, 1972, instituted the present proceeding.

B. Factual Background

Williams is presently serving a prison term of 10-20 years at Clinton Correctional Facility pursuant to a judgment of conviction by a New York County Supreme Court jury for the crime of rape in the first degree (four counts, each involving a separate victim). He was 29 years old at the time of his conviction.

Since he was sentenced by the trial court (MARKS, J.) on May 10, 1965, the thirty day statutory period during which he could file his notice of appeal expired on June 10, 1965 (New York Code of Criminal Procedure § 521). For almost all of this period—from either May 11 or 12, 1965 to June 9, 1965—petitioner was confined at Sing Sing Correctional Facility in Ossining, New York (hereafter Ossining). On the earlier date, he had been transferred to Ossining from New York City; on the later date, he was sent to Attica Correctional Facility. The focal point for an examination of Williams' claims of legal ignorance necessarily revolves around his stay of approximately 28 days at Ossining.

The factual record of this period, as now set forth herein, is based almost entirely on the minutes of his 1968 coram nobis hearing in New York Supreme Court before Mr. Justice Charles Marks (The relevant portions of the Minutes are reproduced in the appendix).

Williams asserted that his trial counsel had led him to believe that an appeal would cost $7,000 (Appendix, 38a). However, on May 12, 1965, or two days after sentencing, he conceded that he was aware of his right to appeal as an indigent, having been advised of his lawyer's misinformation by inmates in the bullpen of the court and at Sing Sing. The crucial portions of the testimony read as follows:

> "Q. Now, who informed you you had a right to appeal without paying seven thousand dollars? A. An inmate informed me.
>
> Q. An inmate informed you. All right. Now this was at Sing Sing? A. Yes, it was in Sing Sing. It was in the bullpen also. (Appendix, 40a)
>
> • • •
>
> Q. Mr. Williams, you stated, in answer to a question by your lawyer, that at the time you arrived at

> Sing Sing, about May 12, 1965, two days after sentence, you knew at that time that you could appeal without paying any money? Right. A. Right". (Appendix, 43a)

Having reviewed the record,* Mr. Justice Marks quite properly concluded:

> "Even conceding defendant's indigence, his alleged ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing prison on May 12. Defendant testified to this at the hearing". (Appendix, 34a)

C. Federal Court Proceedings

Respondent commenced this proceeding in the Southern District of New York (COOPER, J.) in April, 1972. After a thorough review of the State court record, including Williams' 1968 coram nobis hearing, Judge Cooper in a memorandum opinion dated February 16, 1973, concluded:

> "We find petitioner's [*sic*, the present respondent's] failure to appeal either wilful, knowing or the result of his own negligence." (Appendix, 33a)

Williams then appealed to the United States Court of Appeals for the Second Circuit, and following the issuance of a certificate of probable cause on May 21, 1973, and the assignment of counsel, his case was argued on September 20, 1973.

Thereafter, on November 20, 1973, the Court, in a 2-1 decision, reversed the lower court and remanded the matter for an evidentiary hearing.

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* The record also contains an alternative claim—one advanced by Williams at considerable length—that he did in fact attempt to mail out notices of appeal, but was frustrated in his efforts by prison officials. However, this claim was clearly refuted by testimony of the chief clerk at Ossining, who testified on the basis of information obtained from prison records kept during the period in question.

This hearing according to the majority below will resolve two factual matters which in their view had not been considered at the 1968 State coram nobis hearing: (1) the question of whether Williams was aware "of his right to appointed appellate counsel" (Appendix, 14a) and (2) whether he knew of New York State's thirty day statutory limit for filing a notice of appeal.

The first issue occupied virtually all of the majority's attention, with the circuit court concluding that the matter had apparently escaped the State judge's attention "through absolutely no fault of his own" (Appendix, 11a). Justice Marks observed the majority, simply had no reason to assume from the then prevailing case law that the issue of whether Williams was informed of his right to appointed appellate counsel was germane to the coram nobis proceeding. As for Williams' admissions, these, noted the majority, were of probative value only in regard to his knowledge of whether he could proceed *in forma pauperis.*

On the second issue, the opinion is surprisingly silent. Presumably, the majority's view was based solely upon Williams' contention at the coram nobis hearing that his admissions of knowledge did not include an awareness of the statutory time period for filing the notice of appeal (Appendix, 50a).

The dissenting Judge below, Judge Mulligan, noted that if, as the majority asserted, the State court, through no fault of its own, had not had a chance to consider the appointed counsel issue, then the petition had to be dismissed for failure to exhaust State remedies (Appendix, 22a-23a). However, Judge Mulligan, went on to observe that in his view the prevailing law at the time of the hearing and in particular the landmark decision of the New York Court of Appeals in *People* v. *Montgomery,* 24 N Y 2d 130 (1968), which was decided two months prior to the hearing decision, would have put Justice Marks on notice "that Williams was entitled to be advised of his right to *'free assigned counsel'"* (Appendix, 26a, emphasis added). Indeed, a reading of the

hearing minutes revealed that the two matters which formed the basis for the remand had already been weighed by the State court and implicitly incorporated into its findings. The matters were "so clearly logical that [they] could not have escaped the attention of the State court" (Appendix, 30a).

Reasons for Granting the Writ

1. In view of the State Court's factual findings in the coram nobis proceeding, a Federal Court evidentiary hearing is totally unnecessary and would merely serve to ignore both the mandate of 28 U.S.C. § 2254(d) and this Court's recent determination in *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973).

A.

The instant proceeding clearly requires review by this Court since the majority below unashamedly diluted and disregarded this Court's recent reversal of the Second Circuit Court of Appeals in *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973) (*per curiam*).

The primary factual issue tendered before the State coram nobis judge simply stated was whether or not respondent knew of his right to appeal as a poor person. This is clear from the Court's conclusion, following a full and fair evidentiary hearing* at which respondent had testified at great length:

> "Even conceding defendant's indigence, his alleged ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing prison on May 12. Defendant testified to this at the hearing." (Appendix, 34a)

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* See 28 U.S.C. § 2254(d)(2). No claim is made by respondent contradicting the fact that he was accorded a full and fair hearing.

The court below, in reversing the District Court, which had adopted the State court's finding, found the State's determination wanting because it did not specifically set forth its finding that respondent was advised of his right to appointed counsel or of the thirty day time limit within which to appeal.

However, the Court's assumption below that the State coram nobis judge did not address himself to those claims is clearly negated by the colloquy at the State hearing between respondent's counsel and the judge:

> "And it is claimed he was denied his constitutional right to counsel. And may I further submit that the fact that defendant may have been informed about certain of his legal rights does not necessarily mean that he had a right to appeal, that he had a right to appeal as a poor person and that he had 30 days in which to file a notice of appeal.
>
> The Court: Those are questions which the Court will have to try". (Appendix, 51a)

Williams' admission that he had learned within two days of his sentencing that he could appeal "without paying any money" was obviously construed by the State court judge as implying that he knew he was entitled to appointed counsel. In the words of the dissent in the circuit court:

> "The majority interprets this [the admission] as an admission only that he knew he could appeal without paying court costs. He did know something of significance, therefore, even on the assumption of the majority. Since any prisoner knows that the major and primary cost of an appeal is counsel fees, I cannot agree that his answer is susceptible to the limited interpretation of the majority. Justice Marks could well have found that his answer meant what it said, and that when Williams testified that he knew he could appeal without paying money, he meant fee costs". (Appendix, 28a)

Indeed, the admission was so damaging that it apparently impelled Williams' own counsel at the hearing to shift his focus from the question of his client's ignorance of his appeal rights to whether or not these rights were frustrated by the omission or commission of prison officials.* Moreover, it is obvious significance that it never once occurred to Williams during the hearing to assert that he had not been advised of his right to appointed counsel, although he did attempt to hedge on his initial admission in various other respects (e.g., see Appendix, 50a).

As for Williams' contention that he was unaware of New York's 30 day statutory limitation for filing a notice of appeal, this was apparently discounted by the State court judge because of respondent's conflicting claim at the hearing that he had, indeed, made repeated attempts to mail out his appeal before June 10, 1965. Furthermore, Williams' claim was advanced shortly after the District Attorney had moved to dismiss the entire coram nobis proceeding on the basis of his earlier admissions and had thus put him on notice that it might be expedient for him to retract as much as he could.

Accordingly, although the State court here, as in *LaVallee* v. *Delle Rose, supra,* ". . . did not specifically articulate to credibility findings," it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him", *id.* at 692. This Court in the instant proceeding should again remind the court below, as it did in *Delle Rose* that the requirement set forth in 28 U.S.C. § 2254(d) of the presumption of correctness be applied where, as here, the merits of the factual dispute were resolved in the

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* All of this testimony as indicated *infra,* fn. p. 7, was soundly refuted by the chief clerk at Ossining Correctional Facility. The discrepancy between the clerk's testimony and respondent's may have influenced Justice Marks' own view of Williams credibility and may have led him to conclude that certain other portions of his testimony were inaccurate—e.g., the claim that he did not know he had thirty days within which to file his notice of appeal. Needless to say, a state court is under no obligation to "specifically articulate its credibility findings", *Delle Rose,* 410 U.S. at 692.

State court hearing, *id.* 410 U.S. at 695; see also *Procunier* v. *Atchley*, 400 U.S. 446 (1971), reh. den. 401 U.S. 966 (1971); *Wright* v. *State of North Carolina*, 483 F. 2d 405, 408 (4th Cir. 1973); *United States ex rel. Gonzalez* v. *Zelker*, 477 F. 2d 797 (2d Cir. 1973); *Leavitt* v. *Howard*, 462 F. 2d 992, 995-996 (1st Cir. 1972), *cert. denied*, 409 U.S. 884 (1973).

B.

In a transparent attempt to circumvent *Delle Rose*, the court below constructed a remarkable theory to demonstrate that the New York coram nobis proceeding was not dispositive. According to the majority, the State court judge, "through absolutely no fault of his own", (Appendix, 11a) applied the wrong constitutional standard:

> ". . . it is . . . quite reasonable to assume that when, in April of 1969, Justice Marks found that Williams knew he could appeal 'as a poor person', the state judge did not intend to imply any finding that Williams further knew of his right to appointed appellate counsel. It was not until October 10, 1969—some six months after Justice Marks' decision—that this court declared that even in 1965 the State of New York had been obligated, as a necessary consequence of *Douglas* v. *California*, 372 U.S. 353 (1963) [see *infra*], to insure that every indigent defendant was informed of his right to appointed appellate counsel . . . *United States ex rel. Smith* v. *McMann*, 417 F. 2d 648 (2d Cir. 1969) (en banc), *cert.* denied, 397 U.S. 925 (1970)". (Appendix, 14a)

However, what seemed "quite reasonable" to the majority becomes a lot less reasonable when *Smith* is placed in its proper prospective.

Although prior to *Smith* no federal court in the second circuit had specifically imposed on a state the duty described by the majority, it was in fact well established law that an indigent defendant had the right to appointed appellate counsel. Such a right had been firmly set forth by

this Court's landmark decision in *Douglas* v. *California*, 372 U.S. 353 (1963), a case decided more than a year prior to Williams' arrest:

> ". . . where the merits of the *one and only one appeal* an indigent has of right is decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor". (*id.* at 357)

See also, *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967).

One can reasonably assume that Justice Marks was well aware of the import of these decisions.

In addition, two months before the Justice issued his memorandum opinion, the New York Court of Appeals handed down a decision which anticipated virtually every aspect of the more detailed *Smith* opinion. In *People* v. *Montgomery*, 24 N Y 2d 130 (1969), the highest New York appellate court stressed the fact that with regard to the basic right of appealing a conviction, "there is no question that the primary duty of furnishing legal advice to indigent defendants is a State responsibility" (24 N Y 2d at 133). Although, as the opinion of the circuit court notes, the question of appointed appellate counsel was not specifically mentioned in *Montgomery*, it was implicitly contemplated by a decision which was seeking "to provide safeguards against [a defendant's] lack of information" (24 N Y 2d at 133). See also, *People* v. *Callaway*, 24 N Y 2d 127 (1969), a companion case to *Montgomery*. The importance of the *Montgomery* and *Callaway* decisions was noted at some length by the en banc court in *Smith*, 417 F. 2d at 653.*

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* Assuming *arguendo* that *Smith* did, indeed, establish a new constitutional right, then it seems clear that the circuit court should have dismissed the proceeding because of Williams' failure to exhaust his state remedies. *Picard* v. *Connor*, 404 U.S. 270, 276 (1971). This point is made in the dissenting opinion of the circuit court. Appendix, 22a-23a, and a number of pertinent, related cases are noted therein. See, in particular *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F. 2d 598 (3rd Cir. 1964) (*per curiam*).

Accordingly, we think it is clear that a federal evidentiary hearing would involve an altogether needless repetition of factual matters already reviewed by a state tribunal. It would merely furnish Williams with a further opportunity to quibble about an outright admission, which under any reasonable analysis should be dispositive of all of the factual issues in this proceeding.

2. Respondent's failure to exercise a right of which he was well informed constituted a waiver.

Since it is clear that Williams, by his own admission, did have knowledge of his appeal rights, the focus in this proceeding must be and should have been directed to the question of whether his failure to exercise them constituted a waiver. But this is precisely the issue which is blithely ignored by the majority opinion in the circuit court.

In this regard, an examination of the "totality of the circumstances" surrounding Williams' actions after his conviction shows clearly that his failure to file a notice of appeal was an entirely deliberate one. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973); cf. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) and *Boykin* v. *Alabama,* 395 U.S. 283 (1969).

Williams was a mature, 29 year old man at the time of his sentencing who, as his subsequent pattern of litigation indicates, had more than a passing interest in the workings of the law. He had been convicted on the strength of his own confession as well as the identification testimony of his four rape victims; as against this, his sole defense had been a flimsy attempt—discredited by various police witnesses—to show that the confession was beaten out of him and that each of the witnesses had somehow been mistaken about who her assailant was. Evidently, during the period when the impact of these events was freshest in his mind, he reached the conclusion he would have no chance of success in an appeal.

The fact that after beginning to serve a lengthy sentence respondent belatedly convinced himself that his initial impressions were incorrect and frantically began to cast around for a way to reassert a right which he had initially determined to abandon, should be of no reliance now. Williams' present predicament is one of human nature rather than of constitutional rights.

Moreover, while it is clear that at this time respondent is under no obligation to "*specify* those points he would raise, were his right to appeal reinstated", *Rodriguez* v. *United States*, 395 U.S. 327, 330 (1969), emphasis added, it is of undoubted significance that his papers in this proceeding are conspicuously void of any suggestion whatsoever as to what errors were committed in his trial. Respondent apparently seeks to have his appeal rights reinstated for some amorphous purpose known only to himself. Should he be successful on remand, his example would merely serve to open the floodgates still further in a federal system already overburdened by pro se prison litigation.

We respectfully urge this Court to reverse the decision of the circuit court and reinstate the opinion arrived at by the District Court.

CONCLUSION

The petition for certiorari should be granted in all respects.

Dated: New York, New York, February 6, 1974.

Respectfully submitted,

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Decision of Court of Appeals for the Second Circuit Reversing the Denial of Respondent's Petition for Habeas Corpus.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 132—September Term, 1973.

(Argued September 20, 1973 Decided November 20, 1973.)

Docket No. 73-1720

UNITED STATES ex rel. NATHANIEL WILLIAMS,

Petitioner-Appellant,

v.

J. E. LAVALLE, WARDEN OF CLINTON CORRECTIONAL FACILITY, DANNEMORA, N.Y.,

Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
SMITH and MULLIGAN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* denying a writ of habeas corpus without a hearing on the grounds that petitioner's failure to appeal within the prescribed time limit was either willful, knowing, or the result of his own negligence.

Reversed and remanded.

Decision of Court of Appeals for the Second Circuit Reversing the Denial of Respondent's Petition for Habeas Corpus.

BARRY H. GARFINKEL, New York, N.Y. (Josephine Lea Iselin, New York, N.Y., of counsel), *for Petitioner-Appellant.*

DAVID R. SPIEGEL, Deputy Asst. Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for Respondent-Appellee.*

SMITH, *Circuit Judge:*

This is an appeal from denial of a petition by a state prisoner for a writ of habeas corpus in the United States District Court for the Southern iDstrict of New York, Irving Ben Cooper, *Judge.* We find error and remand for hearing.

Perhaps the most difficult aspect of this case is the circumstance that its critical events occurred either before or during what can fairly be called a revolution in the rights of the indigent accused. Fortunately, recent legislative and judicial rules insure that criminal defendants receive the full panoply of constitutional rights. Accordingly, cases such as this, in which denials of the most fundamental rights are alleged, are largely confined to collateral attacks on trials conducted years ago. Nevertheless, when confronted with one of these anachronistic cases, a reviewing court must make certain that the accused was afforded all of the rights to which he was then entitled—even those which may not have been fully articulated until after his opportunity to invoke them. Because we believe the record in this case does not clearly demonstrate that petitioner was aware of all of his rights, we find it necessary to remand for a further hearing.

Decision of Court of Appeals for the Second Circuit Reversing the Denial of Respondent's Petition for Habeas Corpus.

Petitioner Nathaniel Williams was convicted of four counts of rape in New York State Supreme Court, New York County, on March 19, 1965. On May 10, 1965, he was sentenced by the trial judge, The Honorable Charles Marks, J.S.C., to a prison term of ten to twenty years. At the time of his sentencing, Williams was not advised by the court that he had a right to appeal his conviction *in forma pauperis,* that a notice of appeal had to be filed within thirty days, or that he had the right to appointed appellate counsel. As we shall discuss below, this absence of notice was the standard procedure in the New York courts in 1965. Even indigent defendants were not informed of their appellate rights or of how to exercise them. Rather, the prevailing law put the obligation to so inform a convicted defendant on the individual's trial counsel.[1]

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[1] Appellant cites the 1968 version of what is now 22 New York Codes, Rules and Regulations § 606.5. In relevant part, the 1968 version provides:

> Where there has been a conviction after trial or otherwise . . . it shall be the duty of counsel, retained or assigned, and of the public defender, immediately after the pronouncement of sentence . . . to advise the defendant in writing of his right to appeal, the time limitations involved, in the matter of instituting an appeal and of obtaining a transcript of the testimony, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal as a poor person. It shall also be the duty of such counsel to ascertain whether defendant wishes to appeal and, if so, to serve and file the necessary notice of appeal.

Rules of the Supreme Court, Appellate Division, First Department, Pt. 7, Rule V(2)(A) (1968).

In his brief, appellant states that an earlier version of this rule was in effect when Williams was sentenced in 1965. However, a review of prior compilations of the relevant court rules suggests

(footnote continued on following page)

Decision of Court of Appeals for the Second Circuit Reversing the Denial of Respondent's Petition for Habeas Corpus.

In this case, that appears to have been an exceedingly poor choice. At trial, Williams had been represented by an attorney retained by his wife, one John R. Sanders. Just prior to his sentencing, Sanders informed Williams, who was indigent,[2] that an appeal of his conviction would cost seven thousand dollars. Thereafter, contrary to all legal ethics, Sanders abandoned Williams entirely.[3] We must base this sordid account of legal malfeasance on the testimony of petitioner, since Sanders was subsequently dis-

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that any such earlier version was substantially revised in 1967 to take the form quoted above. *See generally,* Rules of the Supreme Court, Appellate Division, First Department, reproduced in *Civil Practice Annual of New York* (1964 through 1967). *But see,* Leon Polsky, *Representation of Defendants,* 36 F.R.D. 129, 154 (1964):

> [The First Department has proposed, though not yet adopted, a ruling] that it is the obligation of an assigned counsel to inquire of his client whether or not he wishes to appeal and that he must advise him in writing of his right to appeal, and it is counsel's obligation to file a notice of appeal on behalf of his client if the client so requests.

In any event, whether or not there was such a legal duty on counsel in 1965 is far less important than the fact that there was so such obligation on the courts. Moreover, there is substantial evidence that whatever legal or ethical duty Williams' counsel had to advise his client, he failed to meet it.

[2] The state has never contested Williams' indigency. Nor has any question of it been raised in the decisions by Justice Marks and Judge Cooper.

[3] The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. . . .

Canon 44, Canon of Professional Ethics.

barred for other unrelated unethical conduct, left the state, and could not be produced to testify.[4]

In opposing this application for a writ of habeas corpus, which would do no more than restore Williams' right to appeal, the state stresses his admission that within two days of his sentencing a fellow inmate advised him of his right to appeal, in the words of the state's attorney, "without paying any money."[5] However, Williams denied that this jailhouse advice ever included any information about his right to appointed appellate counsel or the critical thirty-day time limit.

Undoubtedly confused by the conflicting advice of his private and jailhouse attorneys, Williams wrote to Sanders as late as May 21;[6] Sanders, true to form, never responded. At a state *coram nobis* hearing held in 1968, Williams testi-

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[4] *In re John R. Sanders*, 28 A.D.2d 31, 280 N.Y.S.2d 934 (1st Dept. 1967), *cert. denied*, 390 U.S. 1015 (1968).

At the *coram nobis* hearing, the state's attorney informed the court that in the spring of 1968 his office had attempted to secure Sanders as a witness. (He failed to note that Williams had raised his challenge to Sanders' performance as early as 1966, and yet the state apparently made no effort at that earlier time to question the then practicing attorney.)

At one point, the state did succeed in serving Sanders with a summons, but he failed to appear. The district attorney subsequently learned that in July of 1968 Sanders apparently moved to Ohio. The state, having satisfied itself that Sanders was no longer amenable to New York process, then gave up the search.

[5] Q. Mr. Williams, you stated, in answer to a question by your lawyer, that at the time you arrived at Sing Sing, about May 12, 1965, two days after sentence, you knew at that time that you could appeal without paying any money? Right?

A. Right.

Transcript at 17.

[6] Prison records, admitted at the *coram nobis* hearing, confirm this correspondence.

fied that by the end of May he had decided to attempt an appeal on his own and did, in fact, prepare his own appeal notices. At that hearing, Williams alleged that his attempts to mail the notices before the June 10th deadline were frustrated by prison officials. Not surprisingly, those officials categorically denied this serious charge; and the *coram nobis* judge, again Justice Marks, clearly decided the factual question of official interference against Williams.

In any event, Williams further stated that he did eventually deposit unstamped notice forms in the Sing Sing postal box on June 9, 1965—the day he was transferred from Sing Sing to Attica.[7] He claims that it was not until August of 1965 that he learned—in response to his request for a trial transcript as part of his *pro se* appeal —that no notice forms, timely or otherwise, had ever been received.[8] Since then, Williams has repeatedly attempted to have his right to appeal restored in both the state and federal courts.[9]

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[7] At the *coram nobis* hearing, there was substantial conflicting testimony as to the rules regulating correspondence in the New York prisons in 1965. However, despite such allegations of official interference that are likely to emanate from a closed, controlled society, we must assume, as Justice Marks clearly found, that there was no official frustration of Williams' right to appeal.

[8] It is undisputed that on July 6, 1965, Williams petitioned for a transcript of his trial. The request was denied on August 5, 1965, on the grounds that Williams had failed to file a timely notice of appeal only four weeks before his transcript request.

[9] On May 12, 1966, Justice Marks rejected, as a matter of law, Williams' claim that he had been misled by Sanders.

We think this prior adjudication by the same state judge is significant for three reasons. First, it rebuts any suggestion that Williams fabricated his account of Sanders' malfeasance only after learning of his former counsel's disbarment. In May of 1966,

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For our purposes, the most important of these unsuccessful attempts was the *coram nobis* determination made in 1969. Following an evidentiary hearing held in the fall of 1968, Justice Marks—on April 17, 1969—denied the application in a brief opinion which focused, as did the hearing, on the question of official interference. Justice Marks' only finding with respect to Williams' knowledge of his appellate rights stated:

> Even conceding defendant's indigence, his alleged ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing Prison on May 12, 1965. Defendant testified to this at the hearing.

The *coram nobis* judge thus made no specific finding that Williams was ever advised of his right to appointed appellate counsel or of the thirty-day time limit.

After further exhausting his state remedies,[10] Williams brought this habeas petition. In denying the petition without a hearing, Judge Cooper summarized the findings of

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Sanders was a practicing attorney in New York. Secondly, it suggests that the state's inability to produce Sanders in 1968 was due to its own negligence in not questioning him in 1966 when he was well within the court's jurisdiction. Finally, the 1966 decision is significant in that Justice Marks—citing *Marchese* and *Kling*—clearly embraced the then existing but, as it has now developed, invalid view that only official interference could lead to the restoration of lost appeal rights.

This initial ruling by Justice Marks was subsequently reversed by the Appellate Division, to the extent of granting Williams an evidentiary hearing. *People* v. *Williams*, 28 A.D.2d 985, 283 N.Y.S.2d 661 (1st Dept. 1967).

[10] Justice Marks' decision was affirmed without opinion by the Appellate Division, *People* v. *Williams*, 34 A.D.2d 619, 310 N.Y.S.2d 651 (1st Dept. 1970). On April 24, 1970, leave to appeal to the Court of Appeals was denied.

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Justice Marks and, based on the *coram nobis* record, concluded that Williams knew of his appeal rights:

> We find petitioner's failure to appeal either willful, knowing or the result of his own negligence. He has failed completely to show any deprivation of a constitutional right.

I.

The primary question before us is whether, given all the facts and circumstances of this case, Judge Cooper placed undue reliance on the finding of Justice Marks. However, before we can consider that question, there is a preliminary issue that must be laid to rest: That is, the relevance of the underlying claims petitioner will raise in his state appeal, if his right to appeal is restored. The state, citing two New York cases involving defendants who had pleaded guilty,[11] suggests that this factor is relevant here. But as this and other federal courts have repeatedly held, the underlying merits have no bearing on the question of restoring fundamental appellate rights where they have been wrongfully denied. *United States ex rel. Randazzo* v. *Follette*, 444 F.2d 625, 627-28 (2d Cir. 1971), *cert. denied*, 404 U.S. 916 (1971); *United States ex rel. Smith* v. *McMann*, 417 F.2d 648, 654 (2d Cir. 1969) (*en banc*), *cert. denied*, 397 U.S. 925 (1970); *United States ex rel. Singleton* v. *Woods*, 440 F.2d 835, 838 (7th Cir. 1971); *Wilbur* v. *State*

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[11] *People* v. *Spencer*, —— N.Y.2d —— (N.Y. Ct. of App., June 7, 1973), N.Y.L.J., June 9, 1973 at 1, col. 7-8; *People* v. *Lynn*, 28 N.Y.2d 196, 204-05, 321 N.Y.S.2d 74, 80-81 (1971). In the case at bar, conviction was after trial, and we have no occasion to consider the extent to which a guilty plea may be held to waive any rights.

of Maine, 421 F.2d 1327, 1330 (1st Cir. 1970). *Cf. Rodriquez* v. *United States,* 395 U.S. 327 (1969).

Conversely, it is, of course, equally true that should the district court determine that petitioner is entitled to have his appeal rights restored, it will in no way reflect on the merits of that appeal. At this juncture, the federal courts are concerned only with the fundamental constitutional question of whether or not Williams was deprived of his rights on appeal—most notably, his right to appointed appellate counsel. *Douglas* v. *California,* 372 U.S. 353 (1963).

II.

In support of Judge Cooper's reliance on Justice Marks' finding, the state correctly contends that, under 28 U.S.C. § 2254(d)[12] and the Supreme Court's decision in *LaVallee*

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[12] 28 U.S.C. § 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

* * * * * * *

(3) that the material facts were not adequately developed at the State court hearing:

* * * * * * *

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v. *Delle Rose*, 410 U.S. 690 (1973), the habeas court must accord such prior state findings great weight. *See also, United States ex rel. Cole* v. *Mancusi*, 429 F.2d 61, 65-66 (2d Cir. 1970), *cert. denied*, 401 U.S. 957 (1971); *United States ex rel. Liss* v. *Mancusi*, 427 F.2d 225, 227 (2d Cir. 1970).

However, it is equally true that the habeas court must itself insure that the relevant facts were found and that the correct legal standard was applied to them.[13] 28 U.S.C.

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(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied the process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

[13] There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits.

. . . If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim.

Townsend v. *Sain*, 372 U.S. 293, 313-14 (1963).

§ 2254(d)(1, 3, 6-8); *Townsend* v. *Sain*, 372 U.S. 293, 312-19 (1963). It is only where "it can scarcely be doubted" that the relevant factual issues have been resolved against the petitioner *and* that "there is no evidence that the state trier utilized the wrong [legal] standard," that § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing. *La Valle* v. *Delle Rose*, 410 U.S. 690, 692, 695 (1973).

Here we believe that the state judge—through absolutely no fault of his own—did not focus, and did not make specific findings, on factual questions which have subsequently emerged as critical to petitioner's case. As a matter of law, logic, and reality, there were three distinct pieces of information that Williams—concededly an indigent—needed to effectuate his right to appeal:

1. That he could appeal *in forma pauperis*.
2. That he could obtain appointed appellate counsel.
3. That he had to file his appeal within thirty days.

In determining whether Justice Marks meant to attribute each of these separate pieces of information to Williams in his cryptic finding that Williams knew he could appeal "as a poor person," we must remember some relatively important dates in New York legal history.

First, as noted above, we must recall that when Williams was sentenced in 1965, no New York judge would have thought himself obligated to advise a convicted defendant of his rights to appeal *in forma pauperis* and to appointed appellate counsel. In 1965, if that obligation existed at all, it resided with the trial attorney. Indeed, in 1964, the New York Court of Appeals had even refused to restore the appellate rights of defendants whose counsel had promised, yet failed, to file timely notice. *People* v. *Marchese*,

14 N.Y.2d 695, 249 N.Y.S.2d 888 (1964); *People* v. *Kling*, 14 N.Y.2d 571, 248 N.Y.S.2d 661 (1964).

Such was the law in 1965 when Williams was tried and sentenced; and such was the law in the fall of 1968 when his *coram nobis* hearing was held. Since, in the fall of 1968, only a finding of official interference would restore lost appeal rights, it is not surprising that Williams pinned his hopes on such a claim. Indeed in the fall of 1968, Williams' lack of knowledge and the malfeasance of his attorney were largely irrelevant.

However, on February 27, 1969—four months after the completion of the *coram nobis* hearing, but two months before Justice Marks' opinion—the New York Court of Appeals overturned *Marchese* and *Kling*, *People* v. *Callaway*, 24 N.Y.2d 127, 299 N.Y.S.2d 154 (1969). And, in a companion case, *People* v. *Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156 (1969), the court put the burden of advising defendants of their appeal rights squarely on the state:

> *The time has come for us to announce clearly that every defendant has a fundamental right to appeal his conviction and that, accordingly, basic fairness and due process require that the right not be dissipated either because the defendant was unaware of its existence or counsel failed to abide by a promise to either file or prosecute an appeal.* This determination in no way indicates that courts should or can attempt to second guess counsel. Our decision, very simply, demonstrates a fundamental concern that defendants be informed of their right to appeal, and that, where an attorney, whether assigned or retained, fails to apprise his client of his vital privilege, there is no justification for making the defendant suffer for his attorney's failing.

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The same result is required if this defendant's claim is analyzed in terms of equal protection.

Since the State has provided an absolute right to seek review in criminal prosecutions it constitutionally follows that an indigent defendant cannot be deprived of this review simply because of his poverty. The condition precedent to appellate review of a criminal prosecution is the filing of a notice of appeal. It is apparent that the 30-day period in which an appeal must be docketed is a critical time for the defendant. It cannot be successfully argued that an indigent defendant does not have the right to counsel at this stage of his proceedings.

It is not clear that, at the time this defendant was convicted, there was any positive obligation imposed on assigned counsel to inform defendants of their right to appeal. Presently, the rules of the Appellate Divisions do provide such an obligation.

Even with this obligation, however, we do not believe that an indigent defendant can lose his right to appeal simply because the State delegates its responsibility to a member of the Bar to pass along the requisite information. The courts are the surrogates of the State's responsibility in this field. An indigent defendant cannot lose his right to appeal simply because the courts have deputized a lawyer to fulfill the function and he has failed properly to carry out his duties.

The petitioner, because of his indigency, was compelled in this case to accept the assistance of court-appointed counsel. He claims his counsel did not inform him of his right to appeal. Without such advice this petitioner, who had no previous experience with the law, could not be expected to file a notice of appeal.

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> ***There is no question that the primary duty of furnishing legal advice to indigent defendants is a State responsibility.*** Either by permitting assigned counsel's role to terminate at the end of trial, or failing to provide safeguards against lack of information, the State permitted a critical time period to lapse of which the defendant was unaware. Since, this lack of awareness occurred because of the defendant's poverty, he must be accorded a hearing to determine whether in fact no one informed him of his right to appeal.

24 N.Y.2d 130, 132-34, 299 N.Y.S.2d 156, 159-61 (1969) [citations omitted; emphasis added].

We have quoted *Montgomery* almost *in toto* not only for what it says, but also to demonstrate what it does not say. Most notably, it does not hold that, as part of their responsibility to an indigent with private counsel, a trial court must advise such a defendant of his right to different, appointed appellate counsel. And it is, therefore, quite reasonable to assume that when, in April of 1969, Justice Marks found that Williams knew he could appeal "as a poor person," the state judge did not intend to imply any finding that Williams further knew of his right to appointed appellate counsel. It was not until October 10, 1969—some six months after Justice Marks' decision—that this court declared that even in 1965 the State of New York had been obligated, as a necessary consequence of *Douglas* v. *California,* 372 U.S. 353 (1963), to insure that every indigent defendant was informed of his right to appointed appellate counsel. In *United States ex rel. Smith* v. *McMann,* 417 F.2d 648 (2d Cir. 1969) (*en banc*), *cert. denied,* 397 U.S. 925 (1970), we stated:

> We think the only practical, logical and fair interpretation to be given to Douglas v. California is that

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> it imposes upon the state a duty to warn every person convicted of crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state, if he is indigent. The right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not know such a right exists. And the one way to make sure that he does know is to tell him so.

Id. at 654.

Moreover, we were careful to hold in *Smith* that even the presence of retained counsel did not remove this burden from the state:

> We need not inquire, nor is it of any relevance to the decision of this appeal, whether the prisoner's counsel, retained or assigned, was competent or not competent, or whether he thought the appeal if taken would be successful or dismissed as frivolous. We are dealing here with the duty of the State of New York to afford constitutional protection to the prisoner.

Id. at 655.

It is against this backdrop of the changing law that we must decide whether it can realistically be said that Justice Marks' brief finding that Williams knew he could appeal "as a poor person" necessarily implies that Williams also knew he had a right to appointed appellate counsel. For as this court stated in *Smith,* the right to proceed *in forma pauperis* and the right to appointed counsel are distinct:

> Thus the critical findings in this case must be: Was [the defendant] indigent at the time he was sentenced

> by the New York State court? And, was [the defendant] informed or did he know prior to the expiration of his time to appeal that he could appeal without cost to himself *and* with counsel appointed by the state?

Id. at 655. [emphasis added]

First, it must be noted that an appeal "as a poor person" is roughly the linguistic equivalent of an appeal *in forma pauperis.* Yet as suggested in *Smith,* the right to appeal without paying normal court fees is something very different from the further right to a free attorney.

Were this linguistic equivalence our only evidence that the state *coram nobis* finding encompasses no more than the right to appeal *in forma pauperis,* we might permit the broader interpretation that Williams also knew of his right to appointed counsel. But in the finding itself, there is unmistakable evidence that such a broader interpretation is incorrect. For the sake of clarity, let us repeat exactly what Justice Marks found:

> Even conceding defendant's indigence, his alleged ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing Prison on May 12, 1965. *Defendant testified to this at the hearing.*

[emphasis added].

However, a careful review of the *coram nobis* record indicates that while Williams did testify that he had been advised that he could appeal "without paying any money," he had, on cross-examination, categorically denied that this information had included his right to appointed ap-

pellate counsel:

> Q. Are you telling this Court that you understood, in May of 1965, that the only lawyer that you could have as your lawyer was Mr. Sanders?
>
> Mr. Feldman: Objection, your Honor. It is argumentative.
>
> The Court: I will let him answer. Is that what you understood?
>
> • • •
>
> A. I didn't understand anything, to tell you the truth.
>
> Q. You didn't understand anything?
>
> A. I didn't understand anything.
>
> Q. Were you aware of the existence, in May of 1965, of the Legal Aid Society?
>
> A. I wasn't.

Transcript at 53-54.

Of course, Justice Marks was not bound to accept Williams' account. But the fact that the state judge explicitly based his finding on Williams' own testimony—together with the fact that *Smith* did not articulate the rule on advising defendants of their right to appointed appellate counsel until after Justice Marks' decision—certainly suggests that he did not intend his finding to include timely knowledge of the right to counsel.[14] Similarly, Justice

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[14] A source undoubtedly before Justice Marks provides further evidence that he intended the phrase "appeal as a poor person" to mean nothing more than the right to appeal in forma pauperis: In its opinion reversing his initial decision on Williams' *coram nobis* petition, the Appellate Division used the phrase "right to appellate review as a poor person" to refer to the right to proceed

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Marks made no finding that Williams knew of the thirty-day limit—again, despite Williams' clear testimony that he did not.[15]

In sum, we believe that there is substantial doubt that the state judge here, unaware of a legal standard yet to be announced, made any finding adverse to the petitioner on the critical questions of whether he had timely knowledge of his right to appointed appellate counsel or of the

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in forma pauperis. People v. *Williams,* 28 A.D.2d 985, 283 N.Y.S. 2d 661, 662 (1st Dept. 1967).

This narrow focus is further confirmed by an exchange between the state's attorney and Justice Marks immediately after Williams testified to the limited information provided by his jailhouse lawyer.

> MR. SAWYER: Well, at this time, your Honor, I would ask that, either by stipulation or by direction of the Court, that the writ of error coram nobis being brought by this defendant be denied, in view of the fact that the issue, as defined by the Court of Appeals, was the defendant's indigence *and his ignorance of his right to proceed in forma pauperis.*
>
> • • • • • •
>
> THE COURT: I will not make that finding at this time. I will wait until the entire hearing is over.

Transcript at 17-18 [emphasis added].

[15] Though on remand the district court is certainly free to infer awareness of some time limit from Williams' frantic efforts to file an appeal, we nevertheless believe that the court should make a specific finding on whether Williams knew of the deadline sufficiently early to perfect his appeal. *See, Fox* v. *State of North Carolina,* 266 F. Supp. 19, 21 (E.D.N.C. 1967):

> A defendant who is not aware that there is a time limit within which notice of appeal must be given may find himself in no better position than the defendant who is completely unaware that he has a right of appeal.

See also, Nelson v. *Peyton,* 415 F.2d 1154, 1157-58 (4th Cir. 1969), *cert. denied,* 397 U.S. 1007 (1970); *Victor* v. *Lane,* 394 F.2d 268, 270-71 (7th Cir. 1968).

thirty-day time limit. We must, therefore, remand to the district court for an evidentiary hearing on these unresolved issues.

In so doing, we wish to note that only in a relatively small number of cases will a prisoner be able to raise a credible claim that he was not advised of his right to free appellate counsel. Since *Smith* v. *McMann*, the trial courts have routinely so advised convicted defendants at the time of their sentencing.[16] And even before *Smith*, the rules of practice and legal ethics raise a clear presumption that a defendant with ethical counsel was given such advice. Here, of course, petitioner's testimony and the subsequent disbarment of his attorney rebut that presumption and put the burden on the state to show that, as *Smith* v. *McMann* requires, the indigent petitioner knew, yet waived, his fundamental right to appointed appellate counsel.[17] If

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[16] Indeed, the very purpose of the *Smith* rule was to avoid the necessity of conducting the type of evidentiary hearing that must be held here. *See, United States ex rel. Smith* v. *McMann*, 417 F.2d 648, 654 n. 7 (2d Cir. 1969) *(en banc), cert. denied*, 397 U.S. 925 (1970).

[17] On appeal, the state has argued that once a court makes the minimal finding that a defendant had knowledge of his appellate rights, it need not inquire as to why he failed to exercise them. Since we find that here there was not even such a minimal finding of knowledge of the specific right to appointed appellate counsel, we need not consider this matter directly. We wish to note, however, that other courts conducting the type of inquiry the district court will hold on remand have looked to a number of factors —most notably, the experience of the defendant with criminal procedure and the eventual timing of his appeal—in determining whether the initial failure to appeal constituted a "knowing and intelligent" waiver. *Compare, Bartley* v. *Commonwealth of Kentucky*, 462 F.2d 610, 611 (6th Cir. 1972), *cert. denied*, 409 U.S. 1062 (1972); *United States ex rel. O'Brien* v. *Maroney*, 423 F.2d 865, 867-72 (3d Cir. 1970) *with Nelson* v. *Peyton*, 415 F.2d 1154, 1158 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).

the state cannot meet this burden, the district court must act to restore petitioner's right to appeal.[18]

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[18] The dissent's suggestion that Williams should be remanded to the state courts for further exhaustion of his state remedies deserves some comment. First, it should be noted that far from raising the exhaustion requirement before either this or the district court, the state has emphatically maintained that Williams has pursued every conceivable state remedy in attempting to have his appeal rights restored. In his affidavit to the district court, counsel for the state swore that "Williams has already exhausted his present contention in numerous, repetitive state court proceedings." This averment, which referred the court to "*at least* six, separate state court proceedings," is signicant, since exhaustion is not jurisdictional and may therefore be waived where the state is willing to litigate the petitioner's claim in federal court. *Tolg* v. *Grimes*, 355 F.2d 92, 97 (5th Cir. 1966), *cert. denied*, 384 U.S. 983 (1966); *Hines* v. *Baker*, 422 F.2d 1002, 1004 n. 1 (10th Cir. 1970); *Jenkins* v. *Fitzberger*, 440 F.2d 1188, 1189 (4th Cir. 1971).

Secondly, apart from this waiver, we believe that Williams has sufficiently exhausted his state remedies. The dissent cites six cases for the proposition that after a significant change in criminal constitution law, the state courts must be given an opportunity to reconsider their rejection of a prisoner's prior petition. But each of these decisions is inapposite because in each the fundamental change in the law occurred well after the *final* consideration by the state courts. *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F.2d 598 (3rd Cir. 1964); *Blair* v. *California*, 340 F.2d 741, 743-44 (9th Cir. 1965); *United States ex rel. Walker* v. *Fogliani*, 343 F.2d 43, 45 (9th Cir. 1965); *United States ex rel. Sloan* v. *McMann*, 415 F.2d 275, 276 (2d Cir. 1969); *James* v. *Copinger*, 428 F.2d 235, 241-42 (4th Cir. 1970); *Donlavey* v. *Smith*, 432 F.2d 940, 941 (5th Cir. 1970). Here, by contrast, Justice Marks' decision was affirmed by the Appellate Division—and further review by the New York Court of Appeals was denied—some six months after *Smith* clarified the applicable legal standard.

Finally, it must be remembered that the exhaustion doctrine will not be invoked where it would result in a fundamental injustice. *See, e.g., Thomas* v. *Cunningham*, 335 F.2d 67, 69-70 (4th Cir. 1964); *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463,

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Reversed and remanded for further proceedings in accordance with this opinion.

MULLIGAN, *Circuit Judge* (dissenting):

The majority here holds that the New York State *coram nobis* proceeding is not dispositive because the judge who conducted the evidentiary hearing and wrote the opinion applied the wrong constitutional standard. The majority says that, in the fall of 1968, the state of the law in New York was such that "only a finding of official interference would restore lost appeal rights;" that Williams therefore "pinned his hopes" on his claim that prison officials interfered with his right to appeal; and that Williams' "lack of knowledge [of his appeal rights] and the malfeasance of his attorney" were largely irrelevant. Hence, the ma-

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468 (2d Cir. 1972). It seems appropriate to note that Williams has already spent eight years in fairly constant litigation in seeking no more than his right to appeal. The one state review at issue here took more than four years. Furthermore, it must also be remembered that under New York law the mere consideration of a second *coram nobis* petition based on substantially similar grounds is a matter entrusted to the trial judge's discretion. *People* v. *Mazzella*, 13 N.Y.2d 997, 245 N.Y.S.2d 6 (1963); *People* v. *Sullivan*, 4 N.Y.2d 472, 176 N.Y.S.2d 316 (1958); N.Y. Crim. Pro. Law § 440.20(3) (1970).

Thus, if we send Williams back to the state courts, we may be asking him to spend additional years litigating his right to file a second *coram nobis* petition in order to seek the restoration of his right to appeal his conviction. In view of the fact that Williams has already done everything he could to assert his claim in the state courts, we think such an order "might well invite the reproach that it is the prisoner rather than the state remedy that is being exhausted." *United States ex rel. Kling* v. *LaVallee*, 306 F.2d 199, 203 (Friendly, *J.*, concurring).

jority concludes that Justice Marks did not focus on the factual questions now in issue since they only emerged as critical subsequently, with the issuance of our opinion in *United States ex rel. Smith* v. *McMann*, 417 F.2d 648 (2d Cir. 1969) (*en banc*), cert. denied, 397 U.S. 925 (1970). The argument runs that since the proper constitutional standard had not been articulated until after the state hearing and after the opinion of Justice Marks was filed, our state court brother could hardly have been able to apply it. If the majority is correct in this position, then I submit that the proper relief in this case is a dismissal of the petition rather than a remand to the district court for a further evidentiary hearing. This is so because, if the majority is correct in its analysis, the state court did not have a "fair opportunity" to consider the constitutional defect, and petitioner has thus not exhausted his state remedies. *Picard* v. *Connor*, 404 U.S. 270, 276 (1971); *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121 (2d Cir.), cert. denied, 409 U.S. 1045 (1972).

In *Blair* v. *California*, 340 F.2d 741 (9th Cir. 1965), the basis of petitioner's claim was, like that of petitioner Williams here, that his rights with respect to assigned counsel on appeal of his conviction in the state court had been denied. Blair had raised this claim in his state proceedings, but his contention had been rejected. In the federal habeas proceeding, Blair relied on *Douglas* v. *California*, 372 U.S. 353 (1963), the seminal case which held that indigent defendants have a right to assigned counsel on appeal. Since *Douglas* was decided after the denial of his state claim, the circuit court held that his constitutional right to counsel had not been passed on by the state court, that he therefore had not exhausted his state remedies and that if he did not proceed within 90 days in the state court, his petition should

be dismissed. This doctrine has been recognized in a number of other cases. See *Donlavey* v. *Smith*, 432 F.2d 940 (5th Cir. 1970) (*per curiam*); *James* v. *Copinger*, 428 F.2d 235 (4th Cir. 1970); *United States ex rel. Sloan* v. *McMann*, 415 F.2d 275 (2d Cir. 1969); *United States ex rel. Walker* v. *Fogliani*, 343 F.2d 43 (9th Cir. 1965); Comment, Habeas Corpus—Effect of Supreme Court Change in Law on Exhaustion of State Remedies Requisite to Federal Habeas Corpus, 113 U. Pa. L.Rev. 1303 (1965). In *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F.2d 598 (3rd Cir. 1964) (*per curiam*), the court stated the basis upon which this doctrine rests:

> [A] decent regard for the position and responsibilities of the state courts requires that they be afforded an opportunity to consider and decide these questions before the federal district court is called upon to do so.

Id. at 599.

The circuit court there simply dismissed the petition without conditions. The same result is mandated here if the majority thesis is sound.

If, on the other hand, the issue of Williams' knowledge or lack of knowledge of the thirty-day time limitation and the right to free counsel was squarely placed before the state court, I do not think that my brothers have here accorded the state court decision the respect to which it is entitled.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), the Supreme Court stated that "the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articula-

tion [of the governing legal standard], properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied." Id. at 314-15 (footnote omitted). The Court's recent reversal of this court in *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973) (per curiam) emphasizes our obligation to recognize the state courts as coequal and not inferior tribunals.

It is necessary to inquire as to what evidence my brothers in the majority find to overcome the presumption that the state court recognized the proper standard to be applied. The first claim is that the state court could not have known the proper standard because our opinion in *Smith* had not as yet been published. However, as we have pointed out, this mandates dismissal of the petition. Even if that were not so, I do not think that *Smith* is controlling here. The history of the right of the indigent to free counsel from *Douglas* to *Smith* is set forth in the majority opinion. It was not until *Smith* that a federal court held that, as a necessary corollary of *Douglas,* the State of New York had the obligation, even in 1965, to advise an indigent client of his right to assigned counsel. However, the New York Court of Appeals in *People* v. *Montgomery,* 24 N.Y.2d 130, 299 N.Y.S.2d 156 (1969), in the words of the majority, put the burden of advising defendants of their appeal rights squarely on the state. This case was decided after the state coram nobis proceeding in this case but two months before Justice Marks rendered his opinion. Since it was a sharp departure from the prior practice of the state courts, which had placed the onus on trial counsel to advise convicted indigent defendants of their appellate rights, we

must assume that the case did not escape the attention of an experienced state trial judge who was then bound to advise defendants of their rights to appeal as indigents. The majority, however, says that *Montgomery* "does not hold that, as part of their responsibility to an indigent with private counsel, a trial court must advise such a defendant of his right to different, appointed appellate counsel." Since this precise proposition was not before the Court of Appeals, it was of course not "held," but I cannot accept the conclusion that it was not necessarily implicit in the holding of the state court.

The Rules of the Appellate Division, First Department, in effect when Justice Marks rendered his decision and when he conducted the evidentiary hearing, specified that it was the obligation of trial counsel, *retained or assigned* to advise a defendant who was unable to pay the cost of an appeal of his rights to apply for leave to appeal as a poor person.[1] *Montgomery* shifted that burden from coun-

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[1] The Rules of the Appellate Division, First Department provided as follows:

> (b) *Notification of right to appeal.* (1) *After conviction and sentence.* Where there has been a conviction after trial or otherwise . . . it shall be the duty of counsel, *retained or assigned,* and of the public defender, immediately after the pronouncement of sentence or the service of a copy of the order disposing of the application in the nature of a writ of error coram nobis or a writ of habeas corpus, to advise the defendant in writing of his right to appeal, the time limitations involved, the manner of instituting an appeal and of obtaining a transcript of the testimony, *and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal as a poor person.* It shall also be the duty of such counsel to ascertain whether defendant wishes to appeal and, if so, to serve and file the necessary notice of appeal.
>
> 22 New York Codes, Rules & Regs. § 606.5 (1968) (emphasis added).

sel to the court. I cannot assume that the burden on the court was any less than that which had been on counsel, and, therefore, the state court would have known that Williams was entitled to be advised of his right to free assigned counsel whether he had retained counsel on trial or not. The right of a defendant to be advised of his right to appeal as a poor person obviously does not depend upon some presumption that, since he could afford to retain trial counsel, he could afford appellate counsel and was stuck with him on appeal.[2] The distinction here proffered is too precious, and I cannot accept that *Montgomery* can reasonably be interpreted so academically. Judge Friendly, in his dissenting opinion in *Smith,* observed:

> Today's ruling may not be of great practical importance with respect to New York prisoners in light of Judge Keating's sweeping language in *People* v. *Montgomery* . . . which the majority applauds.

417 F.2d at 659.

In any event, the State here does not contend that Williams was ever advised by the court or by counsel of his right to appeal as an indigent. The claim is made that, either at the detention center in New York City or at Sing Sing Prison, he was so advised by jailhouse lawyers and that therefore he knew of his rights. *Smith* makes it abundantly clear that the critical question in cases such as this is "was [the defendant] informed or *did he know* prior to the expiration of his time to appeal that he could appeal without cost to himself and with counsel appointed by the state?" 417 F.2d at 655 (emphasis added). See also

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[2] As Judge Medina indicated in *Smith,* the only practical method of handling the problem is to require that notification of the right of a poor person on appeal be given to indigents and non-indigents alike. 417 F.2d at 654 n. 7.

Decision of Court of Appeals for the Second Circuit Reversing the Denial of Respondent's Petition for Habeas Corpus.

United States ex rel. Roldan v. *Follette,* 450 F.2d 514, 516 (2d Cir. 1971); *United States ex rel. Witt* v. *LaVallee,* 424 F.2d 421, 423-24 (2d Cir. 1970) (*en banc*). *Douglas* held that the indigent defendant had the right to free counsel on appeal, and, while *Montgomery* and *Smith* held that the obligation to advise the indigent rests on the State, the position of the State here is that, if in fact Williams knew that he had the right to free counsel, the question of whether or not he was officially advised is irrelevant.

To establish that Justice Marks did not focus on Williams' right to free counsel on appeal, the majority emphasizes the last sentence of the pertinent portion of his opinion. He held that Williams' ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing Prison on May 12, 1965. The court stated: "Defendant testified to this at the hearing." But, says the majority here, Williams denied at his state evidentiary hearing that he knew he could have any counsel on appeal other than his retained trial counsel. Reference is then made to the *coram nobis* hearing, in which Williams did testify: "I didn't understand anything, to tell the truth." Justice Marks, who not only had the opportunity to observe the defendant at the evidentiary hearing, but also was the judge at trial, during which Williams was independently identified as a rapist by four of his victims, obviously had the right to find this testimony incredible. Williams' story that he was denied stamps to mail his notice of appeal was demonstrated to be a total fabrication, and this placed his credibility seriously in doubt. Moreover, the state judge was not required to articulate credibility findings in his opinion. *LaVallee* v. *Delle Rose, supra,* 410 U.S. at 692.

Williams further testified that he did know from jailhouse lawyers that he could appeal "without paying any

money." The majority interprets this as an admission only that he knew he could appeal without paying court costs. He did know something of significance, therefore, even on the assumption of the majority. Since any prisoner knows that the major and primary cost of an appeal is counsel fees, I cannot agree that his answer is susceptible to the limited interpretation of the majority. Justice Marks could well have found that his answer meant what it said, and that when Williams testified that he knew he could appeal without paying money, he meant free counsel as well as free costs. It certainly does not fulfill the petitioner's burden "to establish in the District Court by *convincing evidence* that the state court's determination was erroneous." *LaVallee* v. *Delle Rose, supra,* 410 U.S. at 695 (emphasis added).

The majority's only other evidence that Justice Marks did not address himself to Williams' right to free counsel on appeal is the language of his opinion finding that Williams knew of his right to appeal as "a poor person." This is found to be linguistically equivalent to *"in forma pauperis,"* and, it is said, since the broad right to free counsel on appeal was only enunciated in *Smith,* the state court's use of the poor person terminology could not have been intended to indicate a finding that Williams knew his appeal rights had to be exercised within thirty days and included free counsel.[3] This is pure *petitio principii.*

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[3] While the term *"in forma pauperis"* initially referred only to the right to sue "without liability for costs" (Black's Law Dictionary 895 (Rev. 4th ed. 1968)), the term has assumed a much broader meaning since *Douglas.* Rule 32(a)(2) of our own Rules of Criminal Procedure provides that the court "shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal

(footnote continued on following page)

Douglas had already enunciated the rights of an indigent on appeal and *Montgomery* was the precursor of *Smith*.

Aside from this, the majority must assume that Williams' claim was that he did not know of the time limit or the free appeal (else we must dismiss for lack of state exhaustion of remedies). How can we assume that the *coram nobis* judge did not address himself to those contentions? On the contrary, the following colloquy between Williams' counsel and Justice Marks indicates that he did:

> And it is claimed he was denied his constitutional rights to counsel.
>
> And may I further submit that the fact that the defendant may have been informed about certain of his legal rights does not necessarily mean that he knew that he had a right to appeal, that he had a right to appeal as a poor person, and that he had 30 days in which to file a notice of appeal.
>
> THE COURT: Those are the questions which the Court will have to try.

The majority properly insists that as a matter of law, logic and reality, an indigent needs three distinct pieces

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(footnote continued from preceding page)

in forma pauperis." The rule does not mention free counsel. However, in *Johnson* v. *Norton*, 435 F.2d 842, 843 (1st Cir. 1970), the court said: "the trial court did not inform [defendant] of his right of appeal from his conviction and, if indigent, to court-appointed counsel, as required by Fed. R. Crim. P. 32(a)(2)." In *Smith*, Judge Medina stated that the New York and the federal rules "do no more than implement what we think was at all times implicit in the landmark case of Douglas v. California," 417 F.2d at 655. *Douglas* held that the appointment of counsel on appeal for the indigent was constitutionally mandated. *Montgomery* and *Smith* simply put the onus on the state to so advise the indigent. As we have pointed out, that is not in contention here. The State only claims that Williams knew of this right.

of information to effectuate his right to appeal:

1) that he could appeal *in forma pauperis,*

2) that he could obtain appointed appellate counsel,

3) that he had to file his appeal in thirty days.[4]

I totally agree. It is so clearly logical that it could not have escaped the attention of the state court.[5]

I respectfully dissent.

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[4] The majority position that Justice Marks made no finding that Williams knew of the thirty-day time limit is not substantial, as footnote 15 suggests. If Justice Marks found, in the view of the majority, that Williams knew that he did have the right to appeal without costs, it must have been obvious that that information was totally worthless if he was unaware that he had to exercise this right in timely fashion. A specific finding to this effect is not necessary. *Townsend* v. *Sain, supra,* 372 U.S. at 314. Further, in *Montgomery* Judge Keating had emphasized the importance of the time question:

> The condition precedent to appellate review of a criminal prosecution is the filing of a notice of appeal. It is apparent that the 30-day period in which an appeal must be docketed is a critical time for the defendant. It cannot be sucessfully argued that an indigent defendant does not have the right to counsel at this stage of his proceedings (see Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114).

24 N.Y.2d at 133, 299 N.Y.S.2d at 160.

[5] With respect to the argument in footnote 18 of the majority opinion: I agree that Williams made largely the same contentions in the state court as he makes here in the federal courts, although they were of course all made prior to *Smith.* The holding of the majority, however, that the *coram nobis* court did not apply the proper federal constitutional criterion since it had not yet been articulated, prompted the counter-argument that the petition should therefore be dismissed for failure to exhaust. If the majority's position is that the affirmance of the *coram nobis* decision by the Appellate Division and the denial of review by the Court of Appeals were post-Smith and therefore meaningful, then the argument that the state court could not have applied the proper constitutional criterion evanesces. It must be assumed on this theory that the New York appellate courts considered that the *Smith* criterion had been applied and were satisfied. The majority cannot have it both ways. *Haec reputent, videbunt.*

Decision of Cooper, D.J., Dated February 12, 1973, Denying Williams' Application for Habeas Corpus.

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRO SE
72 Civ. 4819

UNITED STATES OF AMERICA *ex rel.* NATHANIEL WILLIAMS,
Petitioner,

against

J. E. LaVALLEE, Warden of Clinton Correctional Facility, Dannemora, New York,
Respondent.

APPEARANCES:

NATHANIEL WILLIAMS
Box B
Dannemora, New York

Petitioner *Pro Se*

HON. LOUIS J. LEFKOWITZ
Attorney General
State of New York
80 Centre Street
New York, New York 10013

Attorney for Respondent

DAVID R. SPIEGEL, Esq.
Deputy Assistant Attorney General

IRVING BEN COOPER, D. J.

Decision of Cooper, D.J., Dated February 12, 1973, Denying Williams' Application for Habeas Corpus.

Petitioner's application for a writ of habeas corpus is denied in all respects. 28 U.S.C. § 2254. Petitioner is confined pursuant to a judgment of conviction for the crime of rape in the first degree after a trial by jury in New York Supreme Court. On May 10, 1965 he was sentenced to a prison term of ten (10) to twenty (20) years.

Petitioner's sole support for the instant application is the alleged deprivation of his right to appeal in the state courts. He contends that his failure to appeal was due to ignorance of his right as an indigent to prosecute an appeal without payment of costs. (Petition, p. 5.) He implies that we should order the state court to resentence him *nunc pro tunc* as of the original date of sentence since he was not properly advised then of his right to appeal as an indigent. See *People* v. *Montgomery*, 25 N.Y. 2d 138 (1969) and *People* v. *Calloway*, 24 N.Y. 2d 127 (1969).

Petitioner has been resentenced once; this was due to the failure of the court in 1965 to comply with former section 2139-a of the Penal Law requiring a psychiatric examination and a report thereof before sentencing of a defendant eligible for a one-day to life sentence under former section 2010 of the Penal Law. In affirming the lower court on March 29, 1971, the Appellate Division of the Supreme Court, First Department, indicated that "Montgomery relief upon the resentence was precluded by virtue of unsuccessful direct proceedings theretofore had." *People* v. *Williams*, 36 A.D. 2d 517-518.

The proceeding aforementioned was by way of *coram nobis* based on the identical issue now before us. An extensive hearing was held on September 30 and November 7, 1968 in New York County Supreme Court. Petitioner's application therein was denied. See *People* v. *Williams*, 28 A.D. 2d 985 (1st Dep't 1967), aff'd 34 A.D. 2d 619 (1st Dep't. 1970), leave to appeal denied by the Court of Appeals April 24, 1970.

Decision of Cooper, D.J., Dated February 12, 1973, Denying Williams' Application for Habeas Corpus.

During that *coram nobis* hearing, petitioner unequivocally stated that he was aware of his right to "appeal without paying any money" (Def't. Exhibit B, transcript p. 13-14, 17) on May 12, 1972, two (2) days subsequent to the date of sentence. This was twenty-eight (28) days prior to the expiration of time to file a notice of appeal.

Petitioner cannot now claim that his appeal was discouraged by his lawyer's statements dealing with the excessive cost of an appeal. (See petition p. 5.) *United States ex'rel. Roldan* v. *Follette,* 450 F.2d 514 (2d Cir. 1971); *United States ex rel. Smith* v. *McMann,* 417 F.2d 648 (2d Cir. 1969).

The only explanation offered by petitioner for failure to timely appeal was that his notice of appeal was not mailed because he lacked postage stamps. (See Def't. Ex. B, p. 16). His argument was refuted by the head clerk at the prison who indicated that postage stamps were supplied for legal mail by the prison chaplains. (Def't Exhibit B, p. 67-8). Furthermore, petitioner had twenty (20) cents worth of postage stamps in his account during the time he allegedly attempted to mail the notice of appeal in question. (Def't. Ex. B, p. 83). He admits that during the same period he mailed six (6) letters including one to his trial attorney. (Def't. Ex. B, p. 62-64).

We find petitioner's failure to appeal either wilful, knowing or the result of his own negligence. He has failed completely to show any deprivation of a constitutional right.

So ordered:

Sacramento, Calif.
February 12, 1973

IRVING BEN COOPER
United States District Judge

Decision of Marks, J., Dated April 17, 1969, Following Williams' 1968 Coram Nobis Hearing.

SUPREME COURT, NEW YORK COUNTY
SPECIAL AND TRIAL TERM, PART XXX

Indictment No. 3729—1964

THE PEOPLE OF THE STATE OF NEW YORK

against

NATHANIEL WILLIAMS,

Defendant.

MARKS, J.:

Defendant appealed to the Appellate Division relative to the orders entered on September 6, 1966 and on December 6, 1966, which orders denied defendant's applications for a writ of error coram nobis, without a hearing. The Appellate Division granted the applications to the extent of directing a hearing on the issue of defendant's indigence and his ignorance of his right to proceed with his appeal in forma pauperis. Both said issues and defendant's further allegation in his writ dated March 29, 1966, that prison authorities at Sing Sing frustrated his attempts to file a notice of appeal, were the subject of a hearing held before this court on September 30, 1968, continued and concluded on November 7, 1968.

Defendant was sentenced on May 10, 1965. Even conceding defendant's indigence, his alleged ignorance of his right to appeal as a poor person was cured when he arrived at Sing Sing Prison on May 12. Defendant testified to this at the hearing.

The remaining question is the issue as to whether his right of appeal was frustrated by the prison officials. Once

Decision of Marks, J., Dated April 17, 1969, Following Williams' 1968 Coram Nobis Hearing.

a coram nobis hearing is granted, the defendant has the burden of proof as to the deprivation of one of his rights (*People* v. *Chait*, 7 A D 2d 399, aff'd 6 N Y 2d 855; *People* v. *Oddo*, 283 A.D. 497).

On the basis of the evidence adduced before this court at the hearing, petitioner has not sustained this burden. At best, there is only an alleged copy of the appeal and defendant's word. Insufficient proof is demonstrated to warrant a finding that failure to follow through on the appeal is to be attributed to the prison officials. Moreover, the presumption of regularity, that those charged with the administration of justice have performed their duties properly, must be noted (*People* v. *Lake*, 190 Misc. 794). This presumption is buttressed by the testimony of Mr. Irving Arras, chief clerk of Sing Sing during the time in question.

Accordingly, the subject writs of error coram nobis are hereby denied in every respect.

This constitutes the decision and order on the motion.

The clerk of the court is directed to forward a copy of this decision and order, with notice of entry, to the district attorney, the attorney for the defendant and to the defendant at his present place of confinement.

Dated, April 17, 1969.

CHARLES MARKS
J. S. C.

Pertinent Portions of the Minutes of Respondent's Coram Nobis Hearing.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SPECIAL AND TRIAL TERM—PART 40.

(Held in Part 39 courtroom)

Indictment 372—64

THE PEOPLE OF THE STATE OF NEW YORK

against

NATHANIEL WILLIAMS,

Defendant-Petitioner.

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100 Centre Street,
New York, N. Y.,
September 30, 1968.

MOTION FOR WRIT OF ERROR, *Coram Nobis*

Before: HON. CHARLES MARKS, J.S.C.

APPEARANCES:

For the People: STEPHEN SAWYER, Esq., Assistant District Attorney.

For the Defendant-Petitioner: EUGENE FELDMAN, Esq.

Indicted for Rape in the First Degree, Assault in the Second Degree, and Carrying a Dangerous Weapon.
Indictment filed September 30, 1964.

* * * * * *

Pertinent Portions of the Minutes of Respondent's Coram Nobis Hearing.

NATHANIEL WILLIAMS, an inmate of Green Haven Prison, the Petitioner herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Feldman:

Q. Mr. Williams, are you the Nathaniel Williams who was convicted on May 10, 1965 of the crime of rape in the first degree on indictment number 3729-1964? A. Right.

Q. Now, on May 10, 1965 were you represented by counsel? A. Right.

Q. Who represented you? A. John R. Sanders.

Q. On that day, prior to being sentenced, did you have a conversation with Mr. Sanders? A. Right.

Q. Where did that conversation take place? A. In the bullpen.

Q. Would you keep your voice up, because I find it hard to hear you,—what did you say to him and what did he say to you at that time, in reference to this case? A. As I was standing in the bullpen, Mr. John R. Sanders come back there and asked me how do I feel. I told him I feel all right. Then also I asked him I would like to file another appeal, you know,—asked him to file another appeal for me. He told me an appeal cost seven thousand dollars.

The Court: Was that on the same day that the jury brought in a verdict? Is that it?

The Witness: No.

The Court: On the day of sentence?

The Witness: On the day of sentence; before sentence.

The Court: Was it after or before sentence?

The Witness: Before sentence.

Q. All right. What did you say to him when he said it was seven thousand dollars to appeal? A. When he told

me—I told him to appeal—it would cost seven thousand dollars; then he asked me if my wife have any money; and I told him no, she don't have any money. He told me he was going to talk to him to send me money. And he went up there and started talking to him about money.

Q. On that same day, what happened thereafter? A. The same day?

Q. Yes, the same day. Did Mr. Sanders then leave you? A. Yes, he did.

Q. Did you then go out into the courtroom? A. Yes. I went out in the courtroom, right. I was called out there.

Q. Were you then sentenced? A. Right.

Q. Did you have any further conversation with Mr. Sanders? A. No.

Q. What happened after you were sentenced? A. What did you say?

Q. What happened after you were sentenced? A. I left there to go to Sing Sing.

> The Court: What happened then?
>
> The Witness: After I got to Sing Sing?
>
> The Court: Yes.
>
> The Witness: When I got to Sing Sing I was placed into a cell for fourteen days. And after the fourteen days was over I saw the P.K. for a job. He told me I have to go to the box, which is segregation.

Q. Let us go back to May 10th, the day you were sentenced. Did you know that you had a right to appeal without paying seven thousand dollars? A. On May 10th I knew.

Q. I mean, without paying seven thousand dollars. A. No.

Pertinent Portions of the Minutes of Respondent's Coram Nobis Hearing.

Mr. Sawyer: I object to that, Judge. He has answered the question.

The Court: No, I will allow it.

Q. When did you first discover that you could appeal without paying seven thousand dollars? A. Well, when I got to Sing Sing.

Q. When, after you got into Sing Sing? A. I got to Sing Sing May 12, 1965.

Q. Did you discover this on May 12th? A. Right.

Q. How did you discover it on May 12th? A. Well, first of all, like I say, after the P.K.—when I went to see the P.K.—

Q. Who is the P.K.?

The Court: I assume, that is the Principal Keeper. Is that it?

The Witness: Yes.

Q. All right.—

The Court: He calls the Principal Keeper, P.K.

A. After I saw the P.K. for a job, he tell me that I need protection. He sends me over to the box, which is segregation. So in the meantime, while I was going over to segregation, and when I was going to segregation, I asked the officer for four copies of appeal. The officer gave me four appeals. And right after that I put a slip in to make a money order, four stamps—to buy four stamps. And after I got the order back, the four stamps and everything,—

The Court: After you what?

A. (continuing.) After I got the four stamps for me—

let me know I have the money on the book, I wrote to the clerk and let him know—

The Court: You say you got the four stamps?
The Principal Keeper gave you four stamps?
The Witness: No. I ordered the four stamps.
The Court: Did you get them?
The Witness: Yes, I got them.

Q. Let me go backover this, Mr. Williams. Now, on May 10th, or thereabouts, you were sent to Sing Sing? A. Yes.

Q. When you got to Sing Sing you saw the Principal Keeper? A. Right.

Q. Now, at the time that you arrived at Sing Sing did you know that you had the right to appeal? A. Right to appeal?

Q. Right to appeal, without paying seven thousand dollars. A. No.

Q. In other words— A. After I got there, right.

Q. Now, who informed you you had a right to appeal without paying seven thousand dollars? A. An inmate informed me.

Q. An inmate informed you. All right. Now, this was at Sing Sing? A. Yes, it was in Sing Sing. It was in the bullpen also.

Q. Now, when you arrived at Sing Sing, did you ask for—I believe you said—four copies of a notice of appeal? A. Yes, four copies of a notice of appeal.

Q. About when was this? A. That was right after the fourteen days.

Q. After the fourteen days? A. Yes.

Q. You didn't ask for it beforehand? A. No.

Q. Why didn't you ask for it before the fourteen days? A. Before the fourteen days?

Q. Yes. A. I don't understand what you mean.

Pertinent Portions of the Minutes of Respondent's Coram Nobis Hearing.

The Court: You said you knew you had a right to appeal—

The Witness: That's right.

The Court: —two or three days after you got to Sing Sing, which is the 12th or 13th of May. Right?

The Witness: Right.

The Court: And then you said you didn't ask for the forms to appeal until fourteen days after. And your lawyer has asked you why didn't you ask for the forms to appeal before that.

The Witness: Well, my lawyer, John Sanders, told me an appeal cost seven thousand dollars.

Q. No. Mr. Williams, maybe you don't understand my question. When you arrived up in Sing Sing, did you go into this lockup immediately? A. Yes.

Q. Did you then have any opportunity to ask for these four copies? A. Right.

Q. Did you have an opportunity? A. Yes, I had opportunity; right.

Q. When did you have the first opportunity to ask for these four copies? A. Right after I got out, after the fourteen days was up.

Q. Then you didn't have an opportunity prior to the fourteen days? A. Right.

Q. All right. Now, after you—Did you get these four copies of the notices of appeal? A. Right.

Q. Did you prepare the notices of appeal? A. Right.

Q. What did you then do with the notices of appeal after you prepared them? A. After I obtained them, like I say, I ordered twenty cents stamps from the commissary. After I got the stamps, I dropped a slip in to the clerk to let him know, I had four copies of the appeal. And he came down to the box, called me out, and take it from me. Then

on another day he brought the papers back to me and told me I had no stamps.

Q. Do you remember approximately when this was?

The Court: He just said, a day or two later.

Q. We have been dealing with "fourteen days" and "days or two". Do you remember about what date it was? A. That was a week—about a week later, I think.

Q. Do you remember whether it was in May or June? A. It was in May.

Q. Then what happened after that?—You now have the papers back. A. Right.

Q. He says "You don't have stamps". Then what happened? A. I showed him the money order that I had when I got to Sing Sing, and also showed him the slip that I did purchase the stamps.

Q. What did he say? A. Then he took my paper back, and take it back to his office. And then another night he sent it back to me. And the next morning I was going to Attica Prison, and I dropped them in the box on the way going to Attica.

The Court: What did you drop in the box?

The Witness: My notice of appeal: the same one. I was going to Attica Prison.

Q. With the stamps? A. No.

Q. How did you expect that this be mailed? A. Well, the stamp was already there.

The Court: Where were the stamps?

The Witness: The stamp was on the records. The stamp was on the record, showing I did bought two stamps.

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Q. What you are saying then is that the records would show you had four stamps? A. Right, right.

Q. Now, when did you discover that the notice of appeal had not been mailed? A. When I got to Attica State Prison.

Q. How did you discover that? A. First of all, I wrote to the clerk—I mean, I sent a motion—I make up a motion to send to the Supreme Court, asking them for my minutes.

Q. And then what did the Supreme Court tell you? A. Well, I got an opposition from the District Attorney, telling me there was no appeal filed, no appeal never filed.

Q. And that is the first time you discovered that the appeal had never been filed? A. Yes. Right away I made another motion for error coram nobis.

Mr. Feldman: I have no further questions.

Cross Examination by Mr. Sawyer:

Q. Mr. Williams, you stated, in answer to a question by your lawyer, that at the time you arrived at Sing Sing, about May 12, 1965, two days after sentence, you knew at that time that you could appeal without paying any money? Right? A. Right.

Mr. Sawyer: Well, at this time, your Honor, I would ask that, either by stipulation or by direction of the Court, that the writ of error coram nobis being brought by this defendant be denied, in view of the fact that the issue, as defined by the Court of Appeals, was the defendant's indigence and his ignorance of his right to proceed in forma pauperis.

The Court: Are you resting, or what?

Mr. Sawyer: No. Your Honor, I would like you

to make an intermediary finding on that issue, since I think there is no—

The Court: I will not make that finding at this time. I will wait until the entire hearing is over.

Mr. Sawyer: All right, Judge.

Mr. Feldman: Furthermore, if I may make one further comment on that, the witness has testified to the fact that when he did arrive at Sing Sing he was put in confinement—

The Court: I am going to get a copy of the testimony, which I assume you will too,—

Mr. Sawyer: All right. Thank you.

The Court: Go ahead.

Q. At the time you were sentenced on May 10, 1965 in the Supreme Court, did you indicate your desire to appeal, for the record? In other words, did you make a statement in the Court, "I wish to appeal"? A. No, I did not know anything about it.

Q. So the only evidence we have of your desire at that time to appeal was ignorance of your right to appeal as a poor person, is your own statment. Is that correct?

Mr. Feldman: I am going to object to that. I think that is unfair comment.

The Court: That's a conclusion that you are arriving at.

Mr. Feldman: It's a summation.

The Court: Let us get to the facts here, that's all.

Mr. Sawyer: All right, Judge.

The Court: You say, when you arrived in State Prison on the 12th that you knew you had a right to appeal without paying seven thousand dollars. Is that right?

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The Witness: Yes.

The Court: Now, you say, fourteen days later you put the appeal in the box, before you left for Attica?

The Witness: No.

The Court: When did you leave for Attica? Do you remember?

The Witness: I don't remember that date.

The Court: How many days after May 12th?

The Witness: How many days after May 12th? Well,—

The Court: You arrived at Sing Sing May 12th. How long were you there before you were sent to Attica?

The Witness: I think, in June.

The Court: In June?

The Witness: Yes.

The Court: Do you know what day in June?

The Witness: I don't remember the date.

Mr. Feldman: If your Honor please, the record, I think, will show that he went there on June 4th.

The Court: June 4th.

Mr. Sawyer: Your Honor, my information is that he arrived in Sing Sing on May 12th; that he left Sing Sing on June 9, 1965. And his appeal period expired on June 10, 1965.

The Court: I see.

Mr. Feldman: I'm sorry.

The Court: Did you keep any copy of that notice of appeal you said that you left in the box, for your own use?

The Witness: Yes. I got a copy there (indicating toward defense table).

The Court: You have a copy?

The Witness: In my briefcase (indicating).

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The Court: Have you got it there?

(Mr. Feldman hands defendant's briefcase to him.)

(The witness extracts a paper from the briefcase and hands same to the Court.)

The Court: Do you want to offer that?

Mr. Feldman: I will (handing same to Mr. Sawyer). I just want to show it to the Assistant District Attorney.

The Court: It is dated the 26th of May.

Mr. Feldman: At this time the defendant offers—

The Court: I will receive it.

Mr. Sawyer: Judge, may I be heard?

Mr. Feldman: —notice of appeal, dated May 26, 1965.

Mr. Sawyer: I object to it, because—

The Court: Wait a minute.

Is that a copy of what you had sent up there?

The Witness: Right.

The Court: Or left, rather, in the box?

The Witness: Yes.

Mr. Sawyer: I object to it, Judge, on the grounds that it is hearsay. And part of that hearsay objection, of course, is that this is a self-serving document. We don't know when he prepared it. It is no evidence of anything. He could have easily had this thing—

The Court: That is something for you to go into now.

Mr. Sawyer: I base my objection on it now.

The Court: I will receive it, for whatever it is worth.

(Notice of appeal, heretofore marked Petitioner's Exhibit A for identification, was received in evi-

dence and marked Petitioner's Exhibit A in evidence.)

The Court: You say you had fifty-eight cents in stamps? Is that it?

The Witness: (Looking at paper) It looks like twenty cents worth of stamps. I bought one pack of—

The Court: You bought twenty cents worth of stamps?

The Witness: Yes.

The Court: And that is dated— It doesn't show the date.

Q. Mr. Williams— A. Yes, sir?

Q. —you arrived at Sing Sing on the 12th of May, 1965. Is that correct? A. Yes.

Q. Now, once you arrived at Sing Sing, you were placed some place for a period of fourteen days. Is that correct? A. Yes.

Q. Where was that? Do you remember? A. It was in the cell.

Q. Were you placed in a special part of Sing Sing for the first fourteen days that you were there? A. It was in the regular gallery. I was there.

Q. You were in the regular gallery. And then, on May 26th, you finished your period of confinement in the reception area, is that correct, in the regular gallery? A. Yes.

Q. And you went some place else? A. Yes.

Q. Where did you go at that time? A. I went over to the P.K.'s office.

Q. What part of the prison were you placed in at that time, if you can remember? A. I was still on the same gallery, but from there they took me over to see the P.K. the same day.

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Q. Is that the Principal Keeper? A. Yes.

Q. Where is the Principal Keeper's office located in the prison, in relation to where your cell is? A. I don't know where the P.K.'s office is at. I didn't stay that long in Sing Sing to find out much about it.

Q. You physically went outside the bars, with your guards? A. He took me out of the cell and took me somewhere else, to another office.

Q. But at all times you were within the barred area of the prison, were you not? A. What do you mean, "barred"?

Q. Where they had the iron bars. Were you behind those bars? A. At this time they had no bars, when they took me out.

Q. What religion are you, by the way? A. Baptist.

Q. Protestant? A. Well, Protestant. Protestant Baptist.

Q. You state that you bought the stamps. Is that correct? A. Yes.

Q. What time—between the time you arrived at Sing Sing, May 12, 1965, and the time you left Sing Sing, June 9, 1965, when did you buy stamps? A. Just about a week.

Q. Pardon me? A. About a week.

Q. Will it refresh your memory if I suggested to you, or told you, you bought the stamps on June 4th, five days before you left? A. No. I didn't bought the stamps. About a week or so after I got .out of the box—

Q. That is not my question, sir. I say, would it at all help you to remember if I were to tell you that you bought the stamps on June 4, 1965, five days before you left Sing Sing? A. I didn't bought them.

Q. Pardon? A. I didn't bought the stamp at that late a date.

The Court: You bought them earlier, you say?

The Witness: I bought them earlier.

The Court: Are you sure of that?

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The Witness: I am sure of that.

Mr. Sawyer: I would like to have marked for identification a Xeroxed copy of a piece of paper.

The Court: Mark it for identification.

(Photostatic copy of paper, above referred to, marked People's Exhibit 1 for identification.)

Mr. Sawyer: For the record, this is a State of New York, Department of Correction, Sing Sing Prison, Postage Account Card of Nathaniel Williams,—

The Court: I assume that it will be conceded that this is a Xeroxed copy?

Mr. Feldman: Yes, I will so concede.

Mr. Sawyer: —bearing Prison Number 135689.

Q. I show you this, Mr. Williams (handing to witness). In looking at that, I ask you whether that recalls to your mind the time that you bought the stamps (handing to witness). A. The day I bought the stamps, you say?

Q. Yes. A. No. It was another day.

The Court: Does that refresh your recollection as to whether or not you bought it on the date set forth in that paper?

The Witness: No.

Mr. Feldman: If your Honor please, may I object to the question on the grounds that there is nothing in that paper which says when or how it can possibly refresh his recollection as to when the purchase was made. The only thing the paper would state is that on a given date there were a certain amount of stamps in his account.

Mr. Sawyer: I, of course, differ with that, your

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Honor. I think it is clear that that date indicates the date of the purchase of the stamps.

The Court: Well, it shows a credit on June 4, 1965 of twenty cents—"Cr" meaning "credit", I suppose.

Mr. Sawyer: If counsel's interpretation were correct, you might expect to see each and every date stamped on there, showing the balance from the time he claims he bought them through June 4th.

The Court: All right. You offer it in evidence?

Mr. Sawyer: Yes.

The Court: All right. Receive it.

(Photostatic copy of postage account of defendant, above referred to, heretofore marked People's Exhibit 1 for identification, received in evidence and marked People's Exhibit 1 in evidence.)

Q. Now, Mr. Williams, looking at this paper, which is now People's Exhibit 1 in evidence, do you still contend, sir, that you bought the stamps a week after you arrived in prison? A. I didn't say a week after I arrived.

Q. When, did you say? A. I said, after the fourteen days.

The Court: After fourteen days.

Q. Mr. Williams, did you know how much time you had within which to appeal, to file it? A. Well, no.

Q. Didn't they tell you that too, when the man told you you had a right to appeal? Weren't you told how many days? A. Nobody told me.

Q. Well, what did you believe? A. I really don't know.

Q. What did you believe, how long that you had to appeal? A. Well, I didn't know anything about it—you mean, after I learned—

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Q. After you learned that you could appeal. A. Nobody told me that I had to file in less than thirty days. Nobody ever told me that.

The Court: But you asked for your papers on appeal—the forms—fourteen days after you were there. Is that correct?

The Witness: Yes.

* * * * * *

Mr. Feldman: And may I further submit that the fact that the defendant may have been informed about certain of his legal rights does not necessarily mean that he knew that he had a right to appeal, that he had a right to appeal as a poor person, and that he had 30 days in which to file a notice of appeal.

The Court: Those are the questions which the Court will have to try.